

No. 46293-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Maxim Lissak, *et al.*, Appellants,

v.

U.S. Bank National Association, etc., Respondent.

Respondent's Response Brief

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I.
INTRODUCTION

Appellant has been in default of a \$335,500 commercial loan since April 2012. In an attempt to stall Respondent's lawful judicial foreclosure, Appellant filed a counterclaim under the Declaratory Relief Act consisting solely of vague allegations concerning a purported attempt to modify the defaulted loan, and then filed this meritless appeal when the trial court dismissed the counterclaim with prejudice. The deal with the Declaratory Relief Act is simple: it provides a remedy when there is a substantive underlying cause of action, but it does not obviate the necessity to plead those substantive causes of action. Nor is the Act capable of subsuming every other cause of action. Realizing that he could never prevail under a breach of contract cause of action and obtain the contractual reformation relief he seeks, Appellant instead decided to seek the same relief but couched in terms of "declaratory relief." As the trial court correctly recognized, it did not have jurisdiction under the Declaratory Judgment Act to order the kind of relief sought by Appellant (contract reformation) and that a breach of contract cause of action must be pleaded as a breach of contract cause of action. For reasons argued in detail below, this Court should affirm the trial court's ruling and uphold the CR 12(b)(6) dismissal of Appellant's claims with prejudice.

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II.
STATEMENT OF THE ISSUES

1. The trial court correctly ruled that it did not have jurisdiction under the Declaratory Relief Act to create a new contract between the parties, nor impose obligations which never existed before, or expunge lawful provisions negotiated by the parties.

2. The trial court therefore correctly ruled that Appellant's counterclaim under the Declaratory Relief Act, which sought to modify the contractual obligations between the parties, failed to state a claim upon which relief could be granted, and was subject to dismissal with prejudice pursuant to CR 12(b)(6).

III.
STATEMENT OF THE CASE

On or about March 27, 2007, Appellant borrowed \$335,500 (the "Loan") from Greenpoint Funding, Inc. (CP 2.) The Loan is evidenced by a Deed of Trust which recorded against real property commonly known as 5007 NE St. Johns Road, Vancouver, Washington 98682 (the "Property") to ensure its repayment. (*Id.* at 3.) Respondent is the current beneficiary of the Deed of Trust and holder of the underlying promissory note. (*Id.* at 2-3.) On April 1, 2012, Appellant defaulted on the Loan by failing to make an installment payment when due and failing to make all subsequent payments when due. (*Id.* at 3.) Appellant remains in default under the terms of the Loan. (*Id.*) Respondent filed a judicial foreclosure lawsuit to obtain a

judgment to sell the Property at a sheriff's sale due to Appellant's continuing default under the terms of the Loan.

In response, Appellant filed essentially a general denial with affirmative defenses along with a two identical causes of action for "Declaratory Judgment." (*Id.* at 77-82 (the denial and defenses), 82-85 (the causes of action).) Appellant alleges: (1) that he informed Respondent that he wanted to be considered for a loan modification; (2) that Respondent informed him only delinquent borrowers are considered for loan modifications, (3) so Appellant should default on his loan; (4) Appellant defaulted on his loan; and (5) Appellant was never considered for a loan modification. (*Id.* at 82-84.) In doing so, Appellant "fully followed [Respondent's] advice in *expectation that [Respondent] would offer to him loan modification* [sic]" (*emphasis added*). (*Id.* at 83.)

Based on these allegations, Appellant makes vague, nearly nonsensical requests for relief. He first "seeks determination and declaration of his rights pursuant to the [Declaratory Judgment Act]." (*Id.* at 82.) He later asserts, in his first cause of action for "Declaratory Judgment," that a true and justiciable controversy exists between the parties "regarding [Appellant's] rights to a loan modification," and that "[a]djudication" by the court would "definitively resolve the controversy." (*Id.* at 84.) In his second cause of action for "Declaratory Judgment," he argues that a true and justiciable controversy exists between the parties "regarding [Appellant's] rights based on representations made by [Respondent] with relation to loan modification

[sic] and [Appellant's] reliance on such representations,” and again seeks “adjudication of this controversy” by the court through the issuance of a declaratory judgment. (*Id.* at 84-85.)

Appellant filed a motion to dismiss, which was granted, and the counterclaims were dismissed with prejudice. (CP 106.) This appeal results from the order granting the motion to dismiss. Appellant argues that his counterclaims withstand 12(b)(6) scrutiny, and asks this Court to vacate the judgment below and remand for further proceedings. Respondent continues to contend that the trial court was correct because Appellant's causes of action are improperly pleaded breach of contract causes of action which seek the remedy of contract reformation, which the court lacks jurisdiction to consider under the Declaratory Judgment Act.

IV. **ARGUMENT**

A. The Standard of Review is De Novo

This Court reviews questions of statutory interpretation *de novo*. *In re C.M.F.*, 179 Wash.2d 411, 418 (2013); *State v. Morales*, 173 Wash.2d 560, 567 n.3 (2012). This Court reviews *de novo* a ruling on a motion to dismiss a claim under CR 12(b)(6). *Reid v. Pierce County*, 136 Wash.2d 195, 200-01 (1998). Dismissal under CR 12(b)(6) is only appropriate if “it appears beyond a reasonable doubt that no facts exist which would justify recovery.” *Cutler v. Phillips Petroleum Co.*, 124 Wash.2d 749, 755 (1994).

B. *A Trial Court Has a Duty to Pierce the Form of the Complaint to Investigate the Substantive Relief Sought*

Appellant's brief substantively focuses on a single argument: the trial court erred because it disregarded the literal form of the pleadings and representations of counsel and instead made inferences as to what Appellant was substantively seeking through his counterclaims. (App. Brief at 15-16.) "[Appellant's] counsel pointed out to the trial court that respondent's counsel confused the issues in that [Appellant's] counterclaims for declaratory judgment related not to loan modification by the trial court, but consideration for loan modification by [Respondent] based on the process designed for distressed borrowers and offered to [Appellant]." (emphasis in original) (*Id.* at 7.) In other words, through his counterclaims, Appellant wasn't actually seeking a loan modification, but a declaratory judgment indicating he should be considered for a loan modification (or something like that).

Even if we ignore the fact that the claims were inarticulately pleaded at best, and therefore needed to be interpreted in some fashion for the court to make sense of them, this tension between what is literally pleaded (i.e., the format of the pleading) and what is being substantively sought in the complaint is nothing new, and the court has a duty to pierce the form of the complaint and consider it in terms of what it substantively seeks. When piercing through the form of the complaint here, it is clear that the declaratory relief causes of action are merely cloaking a failed breach of contract cause of action. *See* §III ¶2 above (restating Appellant's theory of liability).

Recognizing that, under the law of contract, a mere offer to bargain and nothing more does not create an enforceable contract, the cause of action is instead couched as asking the court to determine the “rights” of the respective parties “with respect” to the loan modification. If the Declaratory Judgment Act works how Appellant thinks it works, any cause of action could be couched in similar terms in order to avoid pleading all of its necessary elements. Someone in a car accident could file a declaratory relief cause of action to have the court determine the “rights” of the respective parties “with respect” to the facts concerning the action, subsequent injury, and damages, instead of pleading a cause of action for negligence. Anyone claiming to be wrongfully terminated from employment could file a declaratory relief cause of action to have the court determine the “rights” of the terminated employee “with respect” to the facts concerning the termination from employment. This is what the law does in general: through an adversarial proceeding the rights and liabilities of all parties are adjudicated. So either the Declaratory Judgment Act was designed to subsume every other cause of action, as Appellant suggests it can do, or Appellant is attempting to use it improperly. Respondent suggests the trial court, and therefore the latter interpretation, are correct.

C. *The Trial Court Properly Held it Lacked Jurisdiction Under the Declaratory Judgment Act to Adjudicate Appellant’s Cloaked Breach-of-Contract Claims*

The Uniform Declaratory Judgment Act “is designed to settle and afford relief from insecurity and uncertainty with respect to rights, status and other legal

relations.” *DiNino v. State*, 102 Wash.2d 327, 330 (1984). It is well settled, however, that declaratory judgment does not permit the court to order the imposition of new contracts or alter existing contractual duties between the parties. “A court may not create a contract for the parties which they did not make themselves. It may not impose obligations which never before existed, nor expunge lawful provisions agreed to and negotiated by the parties.” *Wagner v. Wagner*, 95 Wash.2d 94, 104 (1980); *Farmers Ins. Co. v. Miller*, 87 Wash.2d 70 (1976).

Appellant does not plead the existence of a valid contract which necessitates offering Appellant a loan modification because one does not exist (*see* §IV(B) above). The contract which does exist between the parties is the Deed of Trust, which provides that Appellant must make payments when due pursuant to the terms of the underlying promissory note and default permits Respondent to foreclose. Ordering Respondent to offer Appellant a loan modification, or even to “consider” Appellant for a loan modification, would therefore amount to writing a new contract, or adding to or altering language in the Deed of Trust, and doing so pursuant to the Uniform Declaratory Judgment Act would exceed the trial court’s jurisdiction. *See In re Marriage of Mudgett*, 41 Wash. App. 337, 341 (1985) (noting that adding new terms to a contract would amount to writing a new contract and holding “[t]he court is not permitted to do this, however broadly it may construe the Declaratory Judgment Act”), citing *Schoenwald v. Diamond K. Packing Co*, 192 Wash. 409 (1937); *see also Schoenwald*, 192 Wash. at 420 (holding the court may not make or supplement

contracts under the Declaratory Judgment Act); *Chapin v. Collard*, 29 Wash.2d 788, 793 (1948).

Furthermore, it is also well settled that the “declaratory judgment statute may not be invoked where . . . an alleged breach of contract had occurred, as the rights of the party were then fixed.” *Jacobsen v. King County Medical Service Corp.*, 23 Wash.2d 324, 327 (1945). “The redress by action for breach of contract [is] sufficient as that action [breach of contract] [is] adequate for determination therein of all questions that could be raised under the provision of the declaratory judgment statute.” *Id.*, citing *People’s Park & Amusement Ass’n v. Anrooney*, 200 Wash. 51 (1939) . Where, as here, the claimant is seeking redress from breach of a purported oral or written contract, the claimant must sue on the contract itself (i.e., bring a cause of action for breach of contract), not through declaratory relief. *Jacobsen*, 23 Wash.2d at 327; *see also Anrooney, supra* (a declaration will not be made as to the rights of parties to a contract, under the Declaratory Judgment Act, where it appears that the controversy relates to acts which have already been committed and for the redress of which there exists an action at law). For these additional reasons, the declaratory relief cause of action fails.

D. *Appellant Has No Constitutional Right to Trial By Jury Because He Can Never Prevail*

Appellant argues that the trial court violated his right to a fair trial and trial by jury by granting the motion to dismiss. (App. Brief at 7-9.) While there is a

constitutional right to a trial by jury in some civil cases, *see* Wash. Const. art. 1, §21, that does not apply in cases where the claimant fails to state a claim upon which relief may be granted, such as this one, because there is no legally-sufficient claim to prosecute, i.e., the plaintiff will *never* prevail regardless of the facts proven at trial. *See* 14 Wash. Prac., Civil Procedure § 12:24 (2d ed.); CR 12(b)(6). Since under the cause of action and allegations pleaded Appellant can never prevail, he has no constitutional right to trial by jury, and the argument fails.

V.
CONCLUSION

For the foregoing reasons, Respondent requests this Court affirm the order granting its motion for to dismiss.

DATED: October 17, 2014

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October 17, 2014 - 3:57 PM

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